IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1631

SEYMOUR ROSENWASSER,

Petitioner,

—against—

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 20th, 1977

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AUTHORITIES CITED

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The petitioner Seymour Rosenwasser prays that a writ of certiorari issue to review the judgment and opinion entered on February 24th, 1977 by the United States Court of Appeals for the Second Circuit in the proceedings entitled *United States of America, appellee* v. *Seymour Rosenwasser, appellant,* Docket No. 76-1260.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at —— F.2d —— (2nd Cir., February 24th, 1977) and appears in the Appendix, p. A-1.

Jurisdiction

The judgment of the Court of Appeals was entered on February 24, 1977. A timely petition for rehearing was denied on April 22nd, 1977. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Can the government in a criminal case be allowed to introduce evidence against one defendant which would tend to implicate another defendant against whom that evidence is inadmissible and the co-defendant is denied the opportunity to cross-examine the witness whose testimony furnished this evidence?

2. Can cautionary instructions cure the prejudicial spill-over described in the above-stated situation?

Constitutional and Statutory Provisions Involved

The Sixth Amendment of the United States Constitution states as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Rule 404(b) of the Federal Rules of Evidence states as follows:

> "(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Rule 611(b) of the Federal Rules of Evidence states as follows:

> "(b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

Statement of the Case

Petitioner Seymour Rosenwasser was convicted in the United States District Court for the Eastern District of New York of one count of violating Title 18, United States Code, Section 659. This 1976 conviction was based upon a finding after trial to jury that Rosenwasser had been the recipient of a stolen interstate shipment of ladies' garments.

Petitioner was indicted and tried with a co-defendant, one Gerald Allicino, who allegedly served as an intermediary between Rosenwasser and the actual thieves who, ac-

cording to the government's principal witness, described himself as Rosenwasser's partner. (T. 99)*

The case against Rosenwasser was a thin one. It rested on the uncorroborated testimony of a convicted felon, one Paul Fleischer. As can be seen from the Circuit Court's review of the evidence, the jury's task was not an easy one and the question of guilt or innocence was close.

Proof at trial established that Rosenwasser was the proprietor of a small garment factory located on one floor of a commercial building in Brooklyn, New York. Taken in the light most favorable to the government, the proof showed that on March 6th, 1972, the hijacker-witness Fleischer and four of his companions brought the stolen goods to Rosenwasser's loft. According to Fleischer, Rosenwasser at first balked but ultimately agreed to purchase one-third of the stolen load. (T 101-102) Rosenwasser, testifying in his own behalf, denied ever meeting Paul Fleischer, let alone having bought stolen goods from him. (A 53-54) In the government's direct case, Fleischer gave a detailed description of the loft in which the stolen goods were placed. (T 93-98) Rosenwasser's description of the premises, on the other hand, contradicted the description furnished by Fleischer. (A 55-62) Four of Rosenwasser's employees, who worked for him in May of 1972, testified that they never observed an incident such as that described by Fleischer. (T 348-352, 358-363, 373-377, 378-383) It was then stipulated that if "approximately another fifteen or twenty employees" of the factory were called, they would testify in a similar manner. (T 390)

The government's strongest weapon in this otherwise weak case dealt with proof that co-defendant Allicino

* The letter "T" refers to the trial transcript, while the letter "A" refers to Appellant's Appendix filed in the United States Court of Appeals for the Second Circuit.

committed another similar act which was to be admitted against him. *Federal Rules of Evidence,* Rule 404(b); *United States v. Papadakis,* 510 F.2d 287, 294 (2nd Cir., 1975). Rather than simply prove that Allicino had pleaded guilty to another similar offense involving an interstate shipment of liquor, the government called an F.B.I. agent, Ernest Haridopolos, who described the circumstances of this stolen liquor transaction. Haridopolos testified that this stolen liquor was found in the same building where Rosenwasser's business was located although not in the space leased by Rosenwasser. (A 35-37) In fact, Rosenwasser was not Allicino's only connection with this building. Allicino's brother, testimony disclosed, was the elevator operator at the building.

Prior to trial, counsel for petitioner Rosenwasser requested that there be a severance or, alternatively, that the proof of the stolen liquor transaction be excluded. (A 9) Instead, the trial court gave a limiting instruction on two occasions which cautioned the jury not to consider the stolen liquor transaction when deciding the case against Rosenwasser. (T 19-20, 310)

This problem was compounded by the fact that petitioner's trial counsel was not permitted to cross-examine Agent Haridopolos because, according to the court and government counsel, Haridopolos was not a witness against Rosenwasser. (A 43-44)

The Circuit Court of Appeals, in affirming this conviction over the dissent of Judge Gurfein, found that although the appeal presented a "close question, and appellant's argument is not without merit," sl.op. at 1977, the district court's cautionary instructions were sufficient and that since Haridopolos was "not a witness against Rosenwasser, there was no reason to permit cross-examination." Sl.op. at 1979.

REASONS FOR GRANTING THE WRIT

To adopt Judge Gurfein's last substantive statement in his dissenting opinion, "This case is only a variation of the *Bruton* problem." Sl. op. at 1990. As with Evans' confession in *Bruton*,* Allicino's "other similar act" became, it is submitted, one of the most crucial pieces of evidence against his co-defendant. With all due respect to the majority opinion in the court below, there can be no question but that the stolen liquor transaction was used against Rosenwasser. In his opening statement to the jury, the prosecuting attorney, when previewing the case, promised to prove that some three weeks after the violation charged in the indictment, Allicino was in possession of stolen liquor at "exactly the same address, exactly the same location in exactly the same building through exactly the same doorway as the stolen sweaters and that's Mr. Rosenwasser's building, and if that's not exactly hold me to it." (T 19) As Judge Gurfein stated in his dissenting opinion:

> "At this juncture no instruction could keep the jury from being suspicious without proof, the very evil guarded against by the Rules of Evidence." Sl.op. at 1985.

And, as noted, when counsel sought to extricate his client from the umbrella of this transaction, he was denied the opportunity to cross-examine. As Judge Gurfein stated:

> "Agent Haridopolos' testimony clearly implicated Rosenwasser. Notwithstanding the precautionary instructions, therefore, Haridolopos ought properly to be considered a witness 'against' Rosenwasser for confrontation purposes."

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* *Bruton* v. *United States*, 391 U.S. 123 (1968).

The dissenter then suggested that petitioner had been deprived of his constitutional right of confrontation. Sl.op. at 1987; *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965).

Lest there be any doubt about the lay jury's inability to separate the stolen liquor transaction from consideration of Rosenwasser's case, one need only turn to a rather remarkable episode which occurred after sentencing. For his participation in this offense, Rosenwasser, a 57-year-old man who had never previously been convicted of a crime, was sentenced to a two-year term of imprisonment. Following sentence, petitioner's wife wrote a letter to the trial court asking why such a harsh sentence had been imposed. This letter was apparently referred by the judge to the United States Department of Probation which attempted to provide the rationale for the imposition of the prison term.* Most worthy of note is the letters' third paragraph which reads:

> "With respect to Allicino, a six-month sentence was imposed which he will have to serve in full. This sentence was decided upon by the court because Allicino has already served a four-month sentence on a similar offense committed at just about the same time that he acted as middleman in the offense involving your husband. *When Allicino was arrested on the other offense, he was unloading stolen cases of whisky at your husband's place of business. No charges were placed against your husband for that offense.*" (A 201; emphasis supplied)

As Judge Gurfein stated:

> "If a trained chief probation office believed appellant to be guilty of the similar offense, what of a lay jury?

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* The letter is reproduced in the Appendix filed in the Second Circuit Court of Appeals at p. 201.

> Analogy is strong to the constitutional vice found incurable by cautionary instructions in *Bruton* v. *United States*, 391 U.S. 123 (1968)."

The result, therefore, is that the Circuit Court's judgment is markedly inconsistent with the principles established by this Court in the *Bruton* case. This is not a situation which is unlikely to recur. As Judge Gurfein concluded:

> "I predict with unhappy confidence that the majority opinion will be cited in all manner of circumstances as establishing that anything goes so far as multiple defendant trials are concerned." Sl.op. at 1989-90.

In view of the ominous forecast, this case is well-suited for review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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May 20th, 1977

APPENDIX

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 205—September Term, 1976.

(Argued September 21, 1976 Decided February 24, 1977.)

Docket No. 76-1260

UNITED STATES OF AMERICA,

Appellee,

—v—

SEYMOUR ROSENWASSER,

Appellant.

Before:

HAYS, TIMBERS and GURFEIN,

Circuit Judges.

Appeal from a judgment of conviction in the United States District Court for the Eastern District of New York (Platt, *J.*), for unlawful possession of goods stolen from an interstate shipment, 18 U.S.C. § 659.

Affirmed.

GERALD L. SHARGEL, Esq., New York, N.Y. (La Rossa, Shargel & Fischetti, New York, N.Y., of counsel), *for Appellant.*

STANLEY A. TEITLER, Assistant United States Attorney, Eastern District of New York (David G. Trager, United States Attorney

for the Eastern District of New York, of counsel), *for Appellee.*

HAYS, *Circuit Judge:*

Seymour Rosenwasser appeals from a judgment of conviction after a jury trial in the United States District Court for the Eastern District of New York (Platt, *J.*). Rosenwasser was tried jointly with Gerald Allicino on a two-count indictment charging them with unlawful possession of goods stolen from interstate commerce, 18 U.S.C. § 659, and a related conspiracy, 18 U.S.C. § 371. Rosenwasser was acquitted on the conspiracy count, but was convicted of having possessed a quantity of women's garments which had been stolen from an interstate shipment of freight. He was sentenced to a two-year term of imprisonment and a $5,000 fine.[1]

Principally, Rosenwasser contends that it was prejudicial error for the district court to deny his motion for severance and then admit testimony by a government agent concerning a subsequent similar offense committed only by Allicino. This error was compounded, appellant claims, by the court's refusal to permit cross-examination of the government agent. Because we find that neither the admission of the other crimes evidence nor the denial of cross-examination was erronous, we affirm.

The government's main witness was Paul Fleischer, an admitted hijacker and convicted felon. He testified that he participated in the hijacking of a truck owned by Arlene Knitwear Company and the subsequent sale of part of the truck's contents to Allicino and Rosenwasser. According to Fleischer, the hijackers and Allicino and Rosenwasser

1 Allicino was found guilty of both the possession and the conspiracy charges. His appeal has been voluntarily withdrawn and is therefore not before this court.

agreed that Rosenwasser would buy one-third of the goods and keep the rest of the load at his factory until the hijackers could find a second buyer. Fleischer testified that the goods were left with Rosenwasser for one day, after which the hijackers picked up the load and delivered it to one Broverman. Although there was corroborative testimony that seven boxes of the stolen goods were taken by the F.B.I. from Broverman's basement after the investigators were led there by Fleischer, the government offered no independent corroboration of Rosenwasser's involvement. Moreover, none of the stolen goods were ever found in his possession.

The government also called F.B.I. agent Ernest Haridopolos, who testified, over appellant's objection, that he had arrested Allicino three weeks after the hijacking for committing a similar act, possession of a stolen interstate shipment of liquor. Haridopolos told the jury that he had arrested Allicino after observing him unloading the stolen liquor at the street level floor of 2395 Pacific Street, Brooklyn, which, according to other testimony, was the building in which Rosenwasser rented factory space and in which Allicino's brother was the elevator operator.

The court cautioned the jury that Haridopolos' testimony was admissible only against Allicino,[2] and Judge

2 "Ladies and gentlemen, you remember that after the opening statement I cautioned you that a portion of the Government's evidence would be only admissible against Mr. Allicino, and this apparently pertains to that portion of the evidence, and secondly, that it would only be introduced for the purpose of showing knowledge or intent in the commission of the crime charged in the indictment, and for that purpose only. I will give you . . . instructions on the law in this question in my charge. But, bear in mind this does not go to prove the crime charged in the indictment. It only, if you find the facts with respect to this portion of the case to be established, it only goes in on the question of knowledge and intent. It doesn't

Platt later repeated this instruction in his charge to the jury.[3] Rosenwasser attempted to cross-examine Harido-

go in as proof to establish the crime charged in the indictment, in and of itself."

Trial Transcript at 310.

The court had addressed the jury on the same issue just after the government completed the opening statement:

"Now ladies and gentlemen, with respect to that last bit of evidence, the Government said it was going to produce pertaining to the alleged possession, allegedly stolen liquor three weeks after the events described in this indictment, that is being offered on what we call proof of a similar act; or what the Government calls proof of a similar act; or what the Government calls proof of a similar act and it's offered solely against the defendant Allicino. It is not being offered against the defendant Rosenwasser and if that evidence is produced it will only be received against defendant Allicino, and it will only be received for a limited purpose of showing knowledge with intent to commit the crime as to which I'll give you a further instruction at the conclusion of the case, but when and if that proof comes I'll give you preliminary instructions on the question; and at the conclusion of the case I'll give you full instructions."

Id. at 19-20.

3 "Now, there was proof in this case which was admitted solely—I should say there was evidence in this case admitted solely against the defendant Allicino, namely the possession of recently stolen liquor, knowing the same to have been stolen sometime shortly after the events alleged in the indictment.

Now, this special instruction, which I said I would give you on this point reads as follows:

The fact that the defendant, Allicino, may have committed another offense at some time is not any evidence or proof whatever that, at a prior time, the accused committed the offense charged in the indictment, even though both defenses (sic) are of a like nature. Evidence as to an alleged earlier or later offense of a like nature may not therefore be considered by the jury, in determining whether the accused did the act charged in the indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first finds that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the act charged in the indictment, leaving aside only the question of whether he did it knowingly and willfully.

If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused, Allicino, did the acts charged

polos, but was barred from doing so on the ground that Haridopolos' testimony had not been admitted against him.

Appellant now claims that the admission of the other crimes evidence had a prejudicial "spill-over" effect against him, *cf. United States* v. *De Sapio*, 435 F.2d 272, 280 (2d Cir. 1970), because no cautionary instruction could have enabled the jury to consider the evidence solely against Allicino. *Cf. Bruton* v. *United States*, 391 U.S. 123 (1968). He therefore concludes that the probative value of the evidence was "outweighed by the danger of unfair prejudice," Fed. R. Evid. 403, and should have been excluded.

This is a close question, and appellant's argument is not without merit. Generally, when similar act evidence is admitted in a multiple defendant trial, it is clear that the co-defendant claiming prejudice could not have been involved in the similar offense. In those circumstances, there is little doubt that a cautionary instruction is sufficient to preserve the co-defendant's right to a fair trial. *See, e.g., United States* v. *Payden*, 536 F.2d 541, 543 (2d Cir. 1976); *see generally, United States* v. *Papadakis*, 510 F.2d 287, 295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *De Sapio, supra*, at 280.

In this case, however, the evidence admitted against Allicino was not so clearly unrelated to the charges against Rosenwasser. The stolen liquor episode occurred only three weeks after the alleged purchase by Rosenwasser of

in the indictment, then the jury may consider evidence as to an alleged earlier or later offense of a like nature, in determining the state of mind, knowledge or intent with which the accused did the acts charged in the indictment. And where all the elements of an alleged earlier or later offense of a like nature are established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that in doing the act charged in the indictment, the accused, Allicino, acted willfully, knowingly, and with specific intent, and not because of mistake or accident or other innocent reason."

the hijacked women's garments; moreover, the liquor was recovered in the same building and on the same floor in which Rosenwasser rented space.[4] We therefore agree that cases such as *United States* v. *Payden, supra*,[5] are not dispositive of this appeal.

Nevertheless, Judge Platt cautioned the jury on three separate occasions that evidence admitted solely against Allicino was not to be considered in deciding Rosenwasser's guilt or innocence. *See* notes 2 and 3 *supra*. Under the circumstances of this case, these limiting instructions were sufficiently strong to preclude the jury from utilizing the agent's testimony to convict Rosenwasser. Thus, it is especially significant that the jury knew that Allicino had access to the Pacific Street building by virtue of his brother's employment there, and that the stolen whiskey had been recovered from a part of the building not leased by Rosenwasser.[6] With the full factual presentation before it, the jury was capable of considering Haridopolos' testimony exclusively against Allicino.[7] In short, we find

4 Nor are we unmindful of the fact that Rosenwasser was convicted on the uncorroborated testimony of a convicted felon.

5 In *Payden*, we held that defendant had not been prejudiced by the introduction of evidence against his co-defendant Vernon, since the trial court's charge had properly cautioned the jury not to consider such evidence against Payden. In that case, however, the evidence admitted against Vernon was relevant to a charge which was totally unrelated to the charges against Payden.

6 Rosenwasser testified that Allicino's brother T[illegible]y was the elevator operator at 2395 Pacific Street, and that his responsibilities included "[taking] care of the building." Trial Transcript at 404-0[illegible]. [illegible]ant also testified, in effect, that the liquor had been recovered from [illegible]ea used commonly by all of the building's [illegible]ants. *Compare* Trial Transcript at 416-19 *with* Trial Transcript 311-18.

7 Indeed, Rosenwasser's acquittal on the conspiracy charge indicates that the jury adhered to the court's instructions. Had the jury considered the stolen liquor evidence against Rosenwasser, such a verdict would be incongruous.

that the wide discretion afforded the trial judge in weighing the probative worth of proffered evidence against its potential prejudicial impact, *see, e.g., United States* v. *Montalvo*, 271 F.2d 922, 927 (2d Cir. 1959), was not abused in this case. *See*, also, *United States* v. *Dwyer*, Nos. 76-1108, 76-1254, slip op. 5091, 5096 (2d Cir. July 26, 1976).

It follows that the district court acted properly in denying appellant the right to cross-examine Haridopolos. The jury would almost certainly have been confused had Judge Platt allowed cross-examination by Rosenwasser after carefully charging that Haridopolos' testimony was directed only against Allicino. We simply do not agree that cross-examination, with the attendant confusion, would have been more effective than the limiting instructions in aiding the jury to disregard the stolen liquor evidence as against Rosenwasser. In sum, once Judge Platt decided, correctly we think, that Haridopolos was not a witness against Rosenwasser, there was no reason to permit cross-examination. We therefore hold that the district court did not abuse its discretion in denying appellant the right to cross-examine Haridopolos. *See Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).[8]

We have carefully considered appellant's other arguments and find them to be without merit. Accordingly, the judgment of conviction is affirmed.

8 Nor was appellant deprived of his sixth amendment right to confrontation. We decline to accept Rosenwasser's argument that "if the witness . . . *arguably* was a witness against him, he should have been allowed to cross-examine." Appellant's Brief at 22 (emphasis in original).

GURFEIN, *Circuit Judge*, dissenting:

I respectfully dissent.

This is a case involving several unusual elements. There was no independent corroboration of the delivery of the goods to appellant Rosenwasser four years earlier. Nor were any of the stolen goods found in his possession. The conviction rested solely on the testimony of one of the hijackers, Paul Fleischer.

According to his testimony, Allicino, the co-defendant, agreed to purchase the entire load. Arrangements were made to deliver the stolen goods to Allicino the following Monday morning, March 6, at a factory building on Pacific Street in Brooklyn, a building with several tenants. On that date, Fleischer met with five of the confederates, and all six went to a building at 2395 Pacific Street where they met with Allicino and his brother, the elevator operator for the building.[1] Allicino helped to unload the stolen goods from the truck and to bring them to appellant's first floor factory by use of the freight elevator. When they reached appellant's floor, Allicino introduced appellant Rosenwasser to the group as his "partner." Rosenwasser immediately proclaimed that he "did not want the load." An argument ensued between one of the thieves and Rosenwasser, in which the thief threatened to kill Rosenwasser if he did not "take the load."[2] At the conclusion of the

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1 *See* note 6, *supra*.

2 The prosecution's version of the purchase of the stolen goods was not the usual stereotype of an eager receiver.

Fleischer testified:

"Q. When you first met Mr. Rosenwasser in the loft there, did you have a conversation with him?

"A. No.

"Q. Did anyone have a conversation with Mr. Rosenwasser in your presence?

"A. Rocky was talking to Allicino and Rosenwasser.

altercation, Fleischer testified, Rosenwasser finally agreed to buy one-third of the stolen goods.[3] "They" were required to keep the rest of the load at Rosenwasser's factory until the hijackers found a second buyer. It was agreed that the thieves would be paid $2300 by appellant and his associates and that Allicino would deliver the money to the house of one of the hijackers. He testified that Allicino did deliver the money that night to the hijackers and that it was divided by the group's participants. Two others were then shown samples of the stolen property and sent to find a buyer for the rest. According to Fleischer, the next morning the entire group picked up

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"Q. What did Mr. Mastriangelo say in your presence, what did Mr. Allicino and Mr. Rosenwasser say in return?

"A. After the load was brought up Mr. Rosenwasser didn't want the load.

"Q. What did he say?

"A. He didn't want it.

"Q. What did he say?

"A. He told it to everybody.

"Q. What was his reply?

"A. An argument broke out between Peters and Rosenwasser.

"Q. What did Charlie Peters say?

"A. Peters yelled out, "I'll kill that Jew bastard if you don't take the load."

"Q. When you say 'they,' what do you mean?

"A. Peters and Rosenwasser.

"Q. What was said, if you can recall, specifically?

"A. It was decided that they would take one-third of the load—

"Mr. Wallach: Objection.

"The Court: Yes.

"Q. Try to remember—

"A. Allicino said he would take one-third of the load.

"Q. What did Mr. Rosenwasser say?

"A. He agreed.

"Q. What did Peters say?

"A. But we have—they will take one-third but they have to keep the rest of the load in their drop." (Tr. 100-02).

3 Fleischer indicated that when he told Allicino that the garments were stolen, it was not in the presence of appellant, but the jury might infer in the circumstances, if Fleischer is believed, that Allicino passed on his own knowledge to appellant.

the rest of the load at Rosenwasser's and took it to the house of one Broverman and were paid for the goods.

FBI agent Ernest Day Haridopolos was permitted to testify that on March 28, 1972 (a date after the substantive count pleaded, and after the pleaded conspiracy had ended), he arrested Allicino for having committed a similar act and that he had charged Allicino with possession of an interstate shipment of hijacked liquor. Not content with testimony that Allicino had possessed a shipment of stolen liquor, the prosecutor had him tell the jury that the arrest of Allicino followed a surveillance of Allicino as he unloaded the stolen liquor at the street level floor of 2395 Pacific Street, Brooklyn, the building in which Rosenwasser had his loft on the first floor and in which Allicino's brother was the elevator operator. That address had already been testified to as the location of appellant's business, as well as being that of other tenants.

In addition to producing character witnesses, appellant himself took the witness stand. Appellant denied any involvement in the crimes charged. He conceded that he was the owner of Trekon Sportswear, located at 2395 Pacific Street, Brooklyn. He admitted knowing Allicino and his family for 25 years, and that on March 6, 1972, the date of the crime, he and Allicino were friends. Appellant swore that he had never received the stolen garments.[4] Four employees of Rosenwasser who worked for him in March 1972 testified that they never observed an incident such as that described by Fleischer. It was stipulated that "if approximately another 15 or 20 employees of the

4 It is possible that fear of violence prompted appellant to consent to take part of the load. That same fear may have prompted him to deny the incident, which, of course, he had no right to do. On the other hand, the testimony of the hijacker may have been false, including the embellishment of appellant's unwillingness and the coercive threat, and appellant may have told the truth in denying the whole incident.

factory were called, they would testify in a similar manner." Appellant also explicitly denied knowing that stolen liquor had been stored on the ground floor of the building during March 1972.

The Government had indicated before trial that it intended to prove a subsequent crime by defendant Allicino. Counsel for Rosenwasser moved for a severance on that ground before trial. The motion was denied. At the opening of the trial, counsel asked the judge whether he had to renew the motion for severance when the United States Attorney opened to the jury or whether it was sufficient that it was brought to the court's attention. The judge did not respond directly on whether counsel had to renew his motion, but, in effect, ruled that a new motion was not necessary when he asked counsel to remind him after the prosecution's opening statement to tell the jury "that he refers only to the defendant Mr. Allicino and does not refer to Mr. Rosenwasser, if as and when proof is required in that event."

At this point the judge was informed that Allicino had pleaded guilty to a violation of 18 U.S.C. § 659, unlawful possession of liquor valued at less than $100 (a misdemeanor).

The trial judge knew that Rosenwasser had sought a severance or exclusion of the "other crime," and that he was ready to renew the motion at the trial. The court also knew that since Allicino had pleaded guilty in connection with the similar offense, a record of conviction was available to establish the commission of the offense. There was no need for oral testimony about the facts involved in the "other crime."[5]

5 Even if the official record of convictions of Allicino were to be held inadmissible because the bargain plea was to a misdemeanor (not a crime punishable by imprisonment in excess of one year) and excluded on the ground that it does not come within the limited hearsay excep-

The prosecution was, nevertheless, permitted to introduce through Agent Haridopolos, who arrested Allicino for the "other crime," the whole story of Allicino's involvement in a quite separate crime which the court recognized required a separate cautionary instruction to the jury to the effect that it was not being offered against Rosenwasser. The story which Haridopolos was permitted to tell ended with the stolen whiskey literally at co-defendant Rosenwasser's doorstep. This testimony was accompanied by photographs taken showing the stolen liquor in the hallway of the building that was also appellant's place of business; the photographs were admitted over objection. In the face of the uncontested conviction of Allicino for this theft, to admit the photographs was, indeed, to gild the lily.

This is, therefore, an unusual case. Generally when evidence of a similar offense is admitted in a multiple defendant trial it is abundantly clear that the co-defendant who claims prejudice could not have been involved in the similar offense. In such circumstances, we have held a cautionary instruction to be sufficient. (*See, e.g., United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975) ("clearly no connection with [co-defendant's] corrupt activities"); *United States* v. *Payden*, 536 F.2d 541, 543 (2d Cir. 1976) (alleged misjoinder of count with which appellant was not connected); *United States*

tion of Rule 803(22) of the Federal Rules of Evidence,—a proposition we need not decide,—the non-hearsay testimony of the agent with personal knowledge of the offense could have been admitted without allowing him to describe the movement of the liquor into the Pacific Street building with photographs in order to spell out a similar offense "against Allicino." The Government does not take the position that such details as the address of the liquor drop proved the details of any *modus operandi;* the evidence was received solely on the issue of intent. We are reminded, moreover, that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Federal Rule of Evidence 403.

v. *De Sapio*, 435 F.2d 272, 280 (2d Cir. 1970) ("it had not the slightest tendency to prove De Sapio's participation in the Con Ed conspiracy")).

But the evidence here had far more than "the slightest tendency" to spill-over. *United States* v. *De Sapio, supra.* The evidence tendered did not relate to a similar offense by Allicino alone without any connection to Rosenwasser. The stolen liquor was brought to appellant's doorstep without an iota of evidence that he had anything to do with the stolen liquor. The prosecution conceded on oral argument in this court that it had "no idea" whether Rosenwasser was, in fact, connected with this crime. Yet, in its opening argument the Government stressed that the stolen liquor was found at "exactly the same address, exactly the same location in exactly the same building through exactly the same doorway as the stolen sweaters and that's Mr. Rosenwasser's building, and if that's not exactly hold me to it." [sic] See Tr. at 19. This hardly seems fair play.

At this juncture no instruction could keep the jury from being suspicious without proof, the very evil guarded against by the rules of evidence. In sum, the circumstantial evidence was not strong enough to show that appellant committed the other offense, but it was, paradoxically, strong enough to cast grave suspicion upon him.[6] For the stolen liquor, as we have seen, was laid at his very doorstep, at the street level floor in the very building where he rented a loft upstairs. Prejudice was inevitable. The spill-over effect is graphically shown in a letter from the Probation Department to appellant's wife in which it is

6 Even where evidence of a similar offense committed by the defendant himself is offered, the proof must be "plain, clear and convincing." *United States* v. *San Martin*, 505 F.2d 918, 921 (5th Cir. 1974); *United States* v. *Machen*, 430 F.2d 523, 526 (7th Cir. 1970). The proof of the similar offense must not merely cast suspicion, for that would simply compound the mischief.

stated that "[w]hen Allicino was arrested on the other offense he was unloading stolen cases of whiskey *at your husband's place of business*." (App. 201). If a trained Chief Probation Officer believed appellant to be guilty of the similar offense, what of a lay jury?[7] Analogy is strong to the constitutional vice found incurable by cautionary instruction in *Bruton* v. *United States*, 391 U.S. 123 (1968).

On a pre-trial motion to sever in a multiple defendant case, the trial judge should elicit from the Government what evidence it intends to offer regarding an alleged similar offense by one defendant which has a spill-over likelihood with respect to another defendant. *See Bruton* v. *United States*, *supra*; *see United States* v. *Glover*, 506 F.2d 291, 298 (2d Cir. 1974). If the spill-over is likely to be prejudicial to the other defendant, the Court should give the Government the choice of a severance or of exclusion of the prejudicial evidence if the Government opts for a *joint* trial. Under Rule 14 where a defendant is prejudiced by a joinder of defendants for trial together, the trial judge has a "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer* v. *United States*, 362 U.S. 511, 516 (1960). *See United States* v. *Papadakis*, 510 F.2d 287 (1975). While Rule 14 speaks in terms of discretion, the failure to grant a severance in the circumstances here related was an abuse of discretion and prejudicial error for the reasons stated herein. Denial of a severance can, if prejudicial, be ground for reversal. *See Schaffer* v. *United States*, 221 F.2d 17, 19 (5th Cir. 1955); *Barton* v. *United States*, 263 F.2d 894 (5th Cir. 1959).[8]

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7 It is possible that a similar inference in the probation report may have affected the sentence, and there should, at least, be a remand for resentencing. *See United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973).

8 As the Advisory Committee on Rules noted, "The purpose of the amendment [in 1966 to Rule 14] is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance." *See Bruton*, *supra*, at 132.

After his efforts to gain a severance had failed, and in the face of the courts' decision that a cautionary instruction was enough to ward off prejudice, Rosenwasser's counsel sought to dissipate the circumstantial basis for the spill-over prejudice by cross-examining agent Haridopolos. Before a question was asked, however, the prosecution objected to allowing appellant's counsel to cross-examine the agent at all. The court agreed with the Government, and denied appellant *any* cross-examination upon the stated ground that "[i]t's not admitted against him."

I think that the stated ground begs the question. Agent Haridopolos' testimony clearly implicated Rosenwasser. Notwithstanding the precautionary instructions, therefore, Haridopolos ought properly to be considered a witness "against" Rosenwasser for confrontation purposes. The constitutional right of confrontation is, in essence, a right to cross-examine. *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965); *Bruton* v. *United States*, *supra*. The scope of the cross-examination is, of course, largely within the court's discretion. *Alford* v. *United States*, 282 U.S. 687, 694, 51 S. Ct. 218 (1931); *see United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). But appellate review of an absolute denial of cross-examination stands in different case. In the words of Wigmore, "The main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination*." 5 Wigmore, *Evidence* § 1395 at 123 (Chadbourn ed. 1975) (emphasis in original).[9]

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9 Ironically, at least the postal inspector who testified to the oral confession implicating Bruton was on the stand subject to cross-examination. Here the FBI agent was on the stand, but even he was held not to be subject to cross-examination.

When the direct examination of the witness sought to be cross-examined has affected the co-defendant, he must be allowed to cross-examine, even if the witness is himself a co-defendant. *See United States* v. *Zambrano*, 421 F.2d 761 (3d Cir. 1970). When the court permitted Agent Haridopolos to spread before the jury the story of Allicino's other criminal conduct with the unfortunate and inevitable suspicion of appellant's participation because of the very circumstances narrated, appellant had the right to clarify the picture by cross-examination. A series of negative responses by Haridopolos with respect to Rosenwasser's involvement would have done far more to dissipate the prejudice than any cautionary instruction or argument by counsel in summation.

As Judge Waterman wrote for this court in *United States* v. *DeCicco*, 435 F.2d 478, 483 (2d Cir. 1970), reversing a conviction for conspiracy to transport stolen goods, in spite of a cautionary instruction:

> "Little discussion is needed to demonstrate that prior similar acts of misconduct performed by one person cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct, unless it be under a 'birds of a feather' theory of justice. Guilt, however, cannot be inferred merely by association."

Here the prejudice was more severe, for the jury, affected by the prosecutor's drawing the very inference in his opening statement, must have been left with the gnawing suspicion that appellant might have had something to do with the similar offense, thereby raising "a prejudicial atmosphere of guilt by innuendo." *See United States* v. *DeCicco*, *supra*, at 482, n.5.[10]

10 In *United States* v. *Zane*, 495 F.2d 683 (2d Cir. 1974), the judge refused appellants the right to cross-examine a witness who contradicted the testimony of a co-defendant Persky, on rebuttal, because of an instruction that it was admitted only against Persky. We said at 694: "if this ruling were crucial we might doubt its soundness as a general principle, since the 'rub-off' effect of testimony against a co-defendant may sometimes prejudice a defendant, despite an instruction that it is not to be considered against him, *see Krulewitch* v. *United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring); *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947)." But we held that, on that record, "nothing in Persky's statement as recounted by Green could have prejudiced Zane and Silverman." Here that is just not so. And in the language of Judge Mansfield in *Zane*, we do have to "cross that Rubicon in this case," *ibid.*

The lack of independent evidence, aside from Fleischer's testimony linking appellant to the crime, fortifies the conclusion that serious prejudice would have resulted from the way the prosecution presented its case, and from the way the trial court denied appellant's efforts to minimize the prejudice.[11]

I have written at some length, because I am troubled by this case, not only by the unfairness to which appellant was subjected, but because, with due respect, affirmance of what the majority concedes "is a close question, and appellant's argument is not without merit" represents, for me, an abdication of our true appellate function.

One cannot help reflecting that justice tends to become bogged down in precedents which at the time they were announced no more expressed the view of the authors on an issue that surfaces later, than the legislature actually thought about an unintended gap in a statute. I predict with unhappy confidence that the majority opinion, will

11 On a new trial, I would have suggested that FBI Agent Redmon not be permitted to state again simply that he had a conversation with appellant without any explanation of its content. No purpose is served by the testimony that the agent had a conversation with a defendant without more, other than to permit the jury to engage in idle speculation that some technical rule prevented the truth from being presented or that appellant had claimed his privilege against self-incrimination. The Government offers no credible support for the technique used or, indeed, for its relevance.

be cited in all manner of circumstances as establishing that anything goes so far as multiple defendant trials are concerned. In my view, that is not good for a balanced and fair system of criminal law. There are few areas in which it is as important for this court to keep a watchful eye as on the admissibility of similar offenses in a case involving more than a single defendant. For this case is only a variation of the *Bruton* problem.

I would reverse the conviction and order a new trial.

Judgment of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

Present:

HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
HON. MURRAY I. GURFEIN

Circuit Judges.

76-1260

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GERALD ALLICINO, SEYMOUR ROSENWASSER,

Defendants,

SEYMOUR ROSENWASSER,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant Seymour Rosenwasser,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Judgment of the United States Court of Appeals for the Second Circuit Denying Petition for Hearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

76-1260

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GERALD ALLICINO, SEYMOUR ROSENWASSER,

Defendants,

SEYMOUR ROSENWASSER,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant Seymour Rosenwasser, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN,

Chief Judge

No. 76-1631

In the Supreme Court of the United States

OCTOBER TERM, 1977

SEYMOUR ROSENWASSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. App. A-1 to A-18) are reported at 550 F. 2d 806.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1977. A petition for rehearing with a suggestion for rehearing *en banc* was denied on April 22, 1977 (Pet. App. A-19 to A-20). The petition for a writ of certiorari was filed on May 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Confrontation Clause requires reversal of petitioner's conviction because the district court permitted

a government witness to testify, over petitioner's objection, regarding a similar offense by his co-defendant, denied petitioner's request for cross-examination, but instructed the jury that it was not to consider this evidence against petitioner.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted, together with co-defendant Gerald Allicino, of unlawful possession of goods stolen from interstate commerce, in violation of 18 U.S.C. 659. The jury acquitted petitioner of conspiracy to possess stolen goods, in violation of 18 U.S.C. 371, although it convicted Allicino of that charge. Petitioner was sentenced to two years' imprisonment and a $5,000 fine. The court of appeals affirmed, one judge dissenting (Pet. App. A-1 to A-18).[1]

Through the testimony of Paul Fleischer, a convicted felon and self-confessed truck hijacker (Tr. 35-49, 129-154, 158-159),[2] the government established that, on March 3, 1972, Fleischer and several confederates hijacked an Arlene Knitwear Company truck that was carrying a shipment of women's garments (Tr. 60-66). Later that day the hijackers met with co-defendant Allicino, who agreed to purchase the entire load after viewing samples of the stolen garments and copies of the shipping documents (Tr. 83-87). Arrangements were made for the delivery of the shipment to Allicino on March 6, 1972, at 2395 Pacific Street, in Brooklyn, New York (Tr. 87-88).

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[1]Allicino's appeal was voluntarily withdrawn in the court of appeals (Pet. App. A-2 n. 1).

[2]"Tr." refers to the transcript of the proceedings before the district court.

On March 6, 1972, the hijackers transported the stolen merchandise to the Pacific Street address. They were met there by Allicino, who helped unload the goods and directed that they be brought to petitioner's first floor garment factory on a freight elevator that was operated by Allicino's brother (Tr. 95-98). Allicino introduced petitioner to the others as his "partner" (Tr. 99). At first petitioner protested that he did not want the goods, and an argument ensued between petitioner and one of the hijackers, but petitioner and Allicino finally agreed to purchase one-third of the shipment and to keep the remainder at the factory until the hijackers could locate another buyer (Tr. 101-102). Petitioner and Allicino agreed to pay $2,300 for their share, and Allicino delivered the money to the hijackers that evening (Tr. 104-110). The next day the hijackers returned to petitioner's factory, picked up the remaining merchandise, and delivered it to Solomon Broverman (Tr. 118-124).[3]

As part of its direct case the government called F.B.I. Agent Ernest Haridopolos, who testified—over petitioner's objection—that some three weeks after the garment hijacking he arrested Allicino for committing a similar act, possession of a stolen interstate shipment of liquor. Haridopolos had observed Allicino unloading the stolen liquor at the street level doorway of the building at 2395 Pacific Street where Allicino's brother was the elevator operator (Tr. 307-317). Although Agent Haridopolos did not mention petitioner in his testimony, other evidence at trial (including petitioner's testimony) established that this was the same building in which petitioner's firm rented space.

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[3]When Fleisher led F.B.I. agents to Broverman's residence they discovered seven boxes of stolen merchandise (Tr. 295-296).

On three separate occasions the trial court cautioned the jury that Agent Haridopolos' testimony was admissible only against Allicino, and was to be considered solely on the question of Allicino's knowledge and intent to commit the crime charged (Pet. App. A-3 to A-5 nn. 2, 3).[4] Petitioner sought to cross-examine Haridopolos concerning Allicino's possession of the stolen liquor in order to dispel any "spillover" as to petitioner. The prosecutor objected on the ground that the agent's testimony had not been introduced against petitioner. The court ruled that since the evidence was not admitted against petitioner (and since this limitation as to its admissibility had been made clear to the jury) petitioner could not cross-examine Haridopolos. The court added, however, that petitioner was free to call Haridopolos as his own witness, whereupon the prosecutor indicated that if petitioner questioned Haridopolos (either as his own witness or on cross-examination) he would thereby "open the door" to further inquiry concerning petitioner's involvement with the stolen liquor. Petitioner then declined to examine Haridopolos (Tr. 319-321).

Petitioner testified on his own behalf and denied any involvement in the crimes charged (Tr. 401-404). He conceded that he operated a women's garment manufacturing business in a first floor factory loft at the Pacific Street building, but he testified that the building was also occupied by other commercial tenants. Petitioner

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[4]These cautionary instructions were given: (1) following the prosecutor's reference to the evidence in his opening statement (Tr. 19-20); (2) prior to Agent Haridopolos' testimony (Tr. 310); and (3) in the court's final charge before submitting the case to the jury (Tr. 618-620). In addition, the jury was instructed that the guilt of each defendant must be determined separately and only on the basis of the evidence (or lack of evidence) against him (Tr. 593).

denied any knowledge of the stolen liquor that had been stored in that building during March of 1972 (Tr. 416-419). He admitted his long friendship with Allicino, who resided on Pacific Street across from the building that housed petitioner's factory (Tr. 404-406).

ARGUMENT

Petitioner contends (Pet. 6-8) that the similar offense evidence of Allicino's subsequent possession of stolen liquor was in fact used against petitioner, and that it was therefore reversible error for the trial judge to prevent his cross-examination of Agent Haridopolos concerning that episode. Although, as the majority below observed, petitioner's argument is "not without merit" (Pet. App. A-5), the court of appeals correctly concluded that the district court committed no reversible error in the particular circumstances of this case.

The trial judge properly exercised his discretion in admitting, as to Allicino, the proof of his subsequent criminal act, because it was relevant to his intent to participate in the conspiracy charged, as well as to his knowledge that the goods he received were stolen. See *United States* v. *Leonard*, 524 F. 2d 1076, 1091 (C.A. 2), certiorari denied, 425 U.S. 958; *United States* v. *Brettholz*, 485 F. 2d 483, 487-488 (C.A. 2), certiorari denied, 415 U.S. 976; Fed. R. Evid. 404(b). Petitioner does not dispute that the trial judge instructed the jury on three separate occasions that this evidence was to be considered only against Allicino, and only for this limited purpose (Pet. App. A-3 to A-5 nn. 2, 3).

He maintains, however, that although he had nothing to do with the stolen liquor transaction, Agent Haridopolos' testimony suggested his involvement, because the liquor was being unloaded at the building in which petitioner had his factory. Accordingly, he contends that this

evidence was introduced against him as well as against Allicino. Petitioner urges that in this case, as in *United States* v. *Bruton*, 391 U.S. 123, a cautionary instruction was not adequate to ensure that the jury would consider this evidence solely against petitioner's co-defendant.

This is a somewhat more difficult case than one in which one defendant's similar act has no logical connection with his co-defendant, and thus its admission could not possibly prejudice this co-defendant. Yet, here, unlike *Bruton*, it is far from clear that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135. This Court also recognized in *Bruton* that in "many circumstances * * * reliance [on limiting instructions] is justified" (*ibid.*), and in most circumstances a reviewing court must presume that the jury followed its instructions. See *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 366-367; *Opper* v. *United States*, 348 U.S. 84, 95; *United States* v. *Davis*, 546 F. 2d 617, 620-621 (C.A. 5); *United States* v. *Pauldino*, 443 F. 2d 1108 (C.A. 10), certiorari denied, 404 U.S. 882; *United States* v. *Frazier*, 394 F. 2d 258 (C.A. 4), certiorari denied, 393 U.S. 984.

In *Bruton*, the evidence in question was testimony regarding an oral confession by Bruton's co-defendant, in which he had admitted that both he *and Bruton* had committed the crime for which they were being tried. The Court characterized this testimony as so "powerfully incriminating" and "devastating" to Bruton, while at the same time so "inevitably suspect" as the testimony of a co-defendant, that a limiting instruction could not be presumed to be effective. 391 U.S. at 135-136.

Here, in contrast, the evidence was a far cry from the powerfully incriminating statement of a co-defendant admitting that petitioner had committed the very act for which he was being tried. Instead, it was only evidence that several weeks after the offense charged co-defendant Allicino unloaded a shipment of another kind of stolen goods at the building in which Allicino's brother worked—which was, as shown by other evidence, the building in which petitioner was a commercial tenant. As the court of appeals correctly concluded (Pet. App. A-6; footnotes omitted):

> Under the circumstances of this case, these limiting instructions were sufficiently strong to preclude the jury from utilizing the agent's testimony to convict Rosenwasser. Thus, it is especially significant that the jury knew that Allicino had access to the Pacific Street building by virtue of his brother's employment there, and that the stolen whiskey had been recovered from a part of the building not leased by Rosenwasser. With the full factual presentation before it, the jury was capable of considering Haridopolos' testimony exclusively against Allicino. * * *

At most, this evidence might leave the jury, as the dissenting judge in the court of appeals stated, "with the gnawing suspicion that [petitioner] might have had something to do with the similar offense * * *" (Pet. App. A-16). But petitioner was not being tried for any offense in connection with the stolen liquor. And this evidence, which raised merely a "suspicion" in connection with that offense, was certainly not such compelling proof of his guilt in the stolen garment episode—for which he was

being tried—that it raised a presumption that the jury could not or would not follow its instructions.[5]

Moreover, although there was, perhaps, a somewhat greater danger that the jury might disregard the limiting instruction and consider Haridopolos' testimony as probative of petitioner's guilt on the conspiracy charge, the jury acquitted him of conspiracy. The majority below correctly viewed this as a further indication that the jury had followed the trial judge's instructions (Pet. App. A-6 n. 7). See *United States* v. *Kaplan*, 554 F. 2d 958, 967 (C.A. 9); *United States* v. *Partin*, 522 F. 2d 621, 641 (C.A. 5), petition for certiorari pending, No. 77-34; *United States* v. *Strand*, 517 F. 2d 711 (C.A. 5), certiorari denied, 423 U.S. 998; *United States* v. *Baum*, 482 F. 2d 1325 (C.A. 2).

Nor is there any suggestion that the evidence in question is "inevitably suspect" like that in *Bruton*. In contrast to a co-defendant's statement, as to which the Court in *Bruton* observed there is a "recognized motivation to shift the blame onto others" (391 U.S. at 136), the evidence here was an F.B.I. agent's testimony regarding his observation of co-defendant Allicino just before his arrest. Indeed, petitioner does not in any way challenge the reliability of this testimony.

Accordingly, the court of appeals correctly concluded that in the circumstances of this case, the trial court's repeated limiting instructions were "sufficiently strong to

[5]Petitioner emphasizes (Pet. 7-8) the suggestion in a letter his wife received from the Department of Probation that his sentence was justified, in part, by his participation in the stolen liquor episode. We do not agree that any possible confusion on the part of the probation department establishes that the jury, which had the benefit of the court's careful instructions, was similarly confused.

preclude the jury from utilizing the agent's testimony to convict" petitioner (Pet. App. A-6).

2. Since this evidence was not admitted against petitioner, and the district court properly assumed that the jury would follow his instructions on this point, the court's refusal to allow petitioner to cross-examine the agent did not constitute an abuse of discretion. The trial judge necessarily has broad discretion to control the scope of cross-examination. See *Geders* v. *United States*, 425 U.S. 80, 87. Here the evidence was not admitted against and did not incriminate petitioner, and the court's discretionary ruling did not impair either petitioner's right of cross-examination or his right to confront the witnesses against him.[6]

As the court of appeals observed, the jury might well have been confused by petitioner's cross-examination of Haridopolos after it had been instructed that his testimony was not admissible against petitioner (Pet. App. A-7). Indeed, when the district court gave petitioner the opportunity to examine Haridopolos as his own witness, petitioner declined, and the transcript suggests that

[6]In *Bruton*, in contrast, the Court held that the petitioner had not been afforded the right to confront the witnesses against him because he had no opportunity to cross-examine his co-defendant, although the trial court's instructions were not adequate to ensure that the jury would not consider his co-defendant's powerfully incriminating but unreliable confession. The Court held that in those circumstances the limiting instruction was not an adequate substitute for cross-examination: "[t]he effect [was] the same as if there had been no instruction at all." 391 U.S. at 137.

his counsel had decided to "leave the door shut" for tactical reasons.[7]

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[7]The following colloquy occured when the government objected to petitioner's attempt to cross-examine Haridopolos (Tr. 319-321; emphasis added):

> [Assistant United States Attorney]: I am objecting to any cross-examination by the defendant Rosenwasser and ask that the jury be instructed that none of his evidence comes in against him.
>
> * * * * *
>
> Mr. Peluso [petitioner's co-counsel]: *In addition to that language being ambiguous as to the address at 2395 Pacific Street, now the impression can be—*
>
> The Court: *No. It's not admitted against him.*
>
> Mr. Peluso: I think I should make it clear to the jury.
>
> The Court: *I have made it clear to the jury. You can call him as your own witness. You can instruct him to remain and put him on the witness stand, if you wish.*
>
> Mr. Wallach [petitioner's co-counsel]: May we just have a moment, Judge.
>
> The Court: Yes.
>
> (Whereupon, an off-the-record conversation was held.)
>
> The Court: I am assuming, [that the Government is] going to be resting momentarily.
>
> [Assistant United States Attorney]: I will say this, your Honor, that the Government will take the position that if Mr. Peluso cross-examines this witness or, in fact, calls him as his own witness, the door will be opened wide for any inquiry that I might want to make, with respect to any knowledge he may have about anything that the defendant Rosenwasser—
>
> Mr. Wallach: *I guess we will leave the door shut.*
>
> The Court: *It's up to you.*
>
> Mr. Peluso: Judge, am I going to be allowed to examine on those exhibits that were in evidence?
>
> The Court: You will be allowed.
>
> Mr. Peluso: Thank you. I will abide by your Honor's ruling, and I will not examine, subject to your Honor's rule.
>
> (Whereupon, the following took place before the jury.)
>
> Mr. Peluso: In view of your Honor's ruling, I have no further questions of this witness.

In these circumstances the court of appeals correctly concluded that (Pet. App. A-7):

> We simply do not agree that cross-examination, with the attendant confusion, would have been more effective than the limiting instructions in aiding the jury to disregard the stolen liquor evidence as against Rosenwasser. * * * We therefore hold that the district court did not abuse its discretion in denying petitioner the right to cross-examine Haridopolos.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

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